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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MUHAMET CIFLIGU et al. Plaintiffs and Appellants, v. COLLIERS INTERNATIONAL GREATER LOS ANGELES, INC., et al., Defendants and Respondents.	B299239, B301547 (Los Angeles County Super. Ct. Nos. YC071865, YC072049)

APPEAL from judgments of the Superior Court of Los Angeles County, Ramona G. See, Judge. The judgment appealed in case No. B299239 is affirmed, and the appeal in case No. B301547 is dismissed.

Epport, Richman & Robbins, Tyler R. Dowdall, Laura E. McSwiggin, and Steven N. Richman for Plaintiffs and Appellants.

Bremer Whyte Brown & O'Meara, Jeremy S. Johnson, Benjamin L. Price, and Courtney M. Serrato for Defendants and Respondents.

In 2008, Herman Coleman (Coleman) leased real property located at 2305 W. 190th Street in Torrance, California (property) to Ambitions, California, Inc. (Ambitions) for a 10-year lease term. Pursuant to a dual-agency consent form signed by Coleman and Ambitions, respondents Colliers International Greater Los Angeles, Inc. (Colliers or Colliers International) and Geoffrey Ludwig (collectively, the Brokers) represented Coleman and Ambitions in connection with this transaction. Among other things, that form imposed upon the Brokers the "duty to disclose all facts known to [the Brokers] materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of," Coleman and Ambitions.

In 2014, appellants Muhamet Cifligu and Zenepe Cifligu (collectively, Cifligus) acquired the property from Coleman, and Coleman assigned to them the lease "together with all of [Coleman's] rights, remedies, privileges and powers thereunder, including the right to collect any and all installments or other sums due and to become due under the Lease and to take any and all proceedings (legal, equitable or otherwise) [Coleman] might otherwise take, but for" that assignment. The Cifligus claim that in 2016, Ambitions discovered for the first time that: (a) Before Ambitions began leasing the property from Coleman, it had been contaminated with certain hazardous chemicals; and (b) because of the contamination, the property was subject to particular limitations stated in a covenant recorded against the property. The Cifligus allege that Ambitions thereafter vacated the property and refused to pay any rent due for the remainder of the lease term.

The Cifligus filed suit against Ambitions for breach of the lease, and later sued the Brokers for breach of contract, a

violation of the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.), and various torts arising out of the Brokers' failure to inform Ambitions of the environmental contamination and the covenant before the lease was executed. The trial court later granted a motion for summary adjudication filed by the Brokers, reasoning that they did not owe any duty under a contract, tort law, or a statute to the Cifligus and that the assignment transferred only rights under the lease to the Cifligus. Subsequently, the trial court entered judgment in favor of the Brokers on the Cifligus' claims. The Cifligus appeal from that judgment.

On appeal in their opening brief, the Cifligus' principal argument is that the assignment from Coleman entitles them to bring their contract, tort, and statutory claims against the Brokers. As explained in our discussion, we reject this argument. Although the Cifligus raise new contentions in their reply brief that arguably could support standing to sue the Brokers as Coleman's assignees, we do not address these arguments first raised in the Cifligus' reply because the Cifligus did not afford the Brokers with an adequate opportunity to respond to these new contentions. We thus affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize only those facts that are relevant to this consolidated appeal.

1. *The transactions giving rise to the instant dispute*[1]

In or around May 2007, Coleman purchased the property. The Brokers represented the seller in this transaction.

During the acquisition, Coleman received certain documents concerning the environmental condition of the property, including a copy of the "covenant and environmental restriction on property" that had been recorded on March 21, 2007 (covenant). The covenant states that "[t]he soil, soil vapor, and groundwater at the Burdened Property have been contaminated by former manufacturing operations." The covenant obligates all owners and occupants of the property to: (a) execute a written instrument that acknowledges the property is subject to the covenant, and (b) ensure that the written instrument "accompan[ies] all purchase agreements or leases relating to all or any portion of" the property. The covenant also imposes certain restrictions on the property, e.g., "[d]evelopment and use of the Burdened Property shall be restricted to industrial, commercial, retail, or office space."

Coleman later hired the Brokers to obtain a tenant for the property. In January 2008, Coleman and Ambitions executed a 10-year lease for a suite on the property; the lease term commenced on April 1, 2008.[2] The lease identifies respondent Colliers as a real estate broker that "assist[ed] in this

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[1] Unless otherwise noted, the parties to this consolidated appeal do not dispute the facts discussed in this section.

[2] Although the lease is dated January 15, 2008, the signature page indicates that Ambitions signed the document on January 23, 2008 and Coleman signed it on January 25, 2008.

transaction." Respondent Colliers prepared and negotiated the lease. The lease makes no reference to the covenant.

Pursuant to a dual-agency consent form, the Brokers represented both Coleman and Ambitions in the lease transaction. The dual-agency consent form provides that the Brokers owe the following duties to Coleman and Ambitions: "(a) a fiduciary duty of utmost care, integrity, honesty and loyalty in the dealings with either Principal [(i.e., Coleman or Ambitions)]; [¶] (b) a duty to exercise diligently reasonable skill and care in performance of its duties; [¶] (c) a duty of honest and fair dealing and good faith; and [¶] (d) a duty to disclose all facts known to Colliers International materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the Principals." Ambitions signed this form on January 27, 2008, and Coleman signed it on January 30, 2008.

The Cifligus claim that at an unspecified point in time, they became Coleman's secured creditors. On September 26, 2014, Coleman executed an assignment of lease and guaranty (assignment). The assignment provides in pertinent part: "For valuable consideration, receipt of which is hereby acknowledged, HERMAN COLEMAN ('Assignor') hereby sells and assigns the Lease and the Guaranty[3] to MUHAMET CIFLIGU and ZENEPE CIFLIGU, husband and wife, as community property ('Assignee'), [*sic*] together with all of Assignor's rights, remedies, privileges and powers thereunder,

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3 On January 23, 2008, James N. Walsh, Inc. executed a guaranty of lease, wherein the entity "guarantee[d] the prompt payment by [Ambitions] of all rents and of other sums payable by" Ambitions under the lease.

including the right to collect any and all installments or other sums due and to become due under the Lease and to take any and all proceedings (legal, equitable or otherwise) Assignor might otherwise take, but for this Assignment."

The Cifligus assert that on October 10, 2014, "in satisfaction of the outstanding debt" owed to the Cifligus, the Cifligus acquired title to the property from Coleman.[4]

The Cifligus assert that on June 2, 2016, Ambitions notified them that Ambitions intended to vacate the property because of the covenant and the environmental contamination to the property. Among other reasons, Ambitions argued that because it provides care and other services to developmentally disabled children and senior citizens, its operations are prohibited by the covenant's restrictions.[5] It is undisputed that Ambitions refused to pay the rent it owed from July 2016 to March 2018.

According to the Cifligus, on March 28, 2017, they used a subpoena to obtain a copy of certain records belonging to the Brokers. The Cifligus claim that they learned from these records that the Brokers had failed to disclose the covenant and the

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[4] The parties do not dispute that the Cifligus acquired title to the property from Coleman on October 10, 2014. We observe that the Cifligus contest the Brokers' assertion that they had "purchased the property" on that date. Instead, the Cifligus insist that they "acquired the property from their position as the secured lender" to Coleman. This discrepancy has no impact on our resolution of the instant consolidated appeal.

[5] Ambitions contended that these activities violated the covenant's proscriptions against "schools for persons under 21 years of age" and "care or community centers for children or senior citizens, or other uses that would involve the regular congregation of children or senior citizens."

environmental contamination to Ambitions during the lease transaction.

2. *The commencement of the trial court proceedings*

After Ambitions notified the Cifligus of its intent to vacate the property, the Cifligus filed an action against Ambitions for breach of the lease.[6] On May 12, 2017, the Cifligus brought suit against the Brokers for failing to disclose the environment condition of the property to Ambitions. It appears that the trial court later consolidated the Cifligus' suits against Ambitions and the Brokers.

On May 19, 2017, Ambitions filed a first amended cross-complaint against the Cifligus, the Brokers, and Coleman for certain contractual, statutory, and tort claims arising out of the cross-defendants' purported concealment of the covenant and the environmental contamination to the property.

On September 29, 2017, the Cifligus filed their first amended complaint, wherein they alleged the following eight causes of action against the Brokers: (1) equitable indemnity; (2) breach of fiduciary duty; (3) constructive fraud; (4) professional negligence; (5) negligent misrepresentation; (6) fraudulent concealment; (7) breach of written contract; and (8) violation of Business & Professions Code section 17200.[7] At bottom, the Cifligus complained that "the Brokers had breached

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[6] The Cifligus' initial pleading against Ambitions is not in the appellate record.

[7] The Cifligus also named Coleman as a defendant "in his capacity as their predecessor-in-interest and assignor of the lease and related rights . . . ." Coleman is not a party to this consolidated appeal.

their fiduciary obligations and violated California law by failing to disclose the Covenant and the environment condition of the Property to Ambitions" before it had signed the lease. The Cifligus further contended that, by virtue of the assignment, "all rights of enforcement, including the right to sue for breach of contract and professional negligence, were transferred and assigned to [them]." The first amended complaint sought, inter alia, $364,811.34 in damages resulting from "Ambitions' decision to prematurely terminate the Lease and vacate the Property" in June 2016, and "indemnity as to all fees, costs and damages from that lawsuit against [the Cifligus] filed by Ambitions."

On December 19, 2017, the Brokers filed an answer, wherein they generally denied each allegation of the first amended complaint and asserted certain affirmative defenses, including the defense that all of the Cifligus' claims are time-barred.

On January 16, 2019, the Cifligus filed a request to dismiss their first cause of action for equitable indemnity with prejudice. The court clerk thereafter entered a dismissal with prejudice on the first cause of action, which went into effect on the date on which the Cifligus had filed their dismissal request.

3. *The Brokers' motion for summary adjudication*

On March 4, 2019, the Brokers moved for summary adjudication on the first amended complaint's second, third, fourth, fifth, sixth, seventh, and eighth causes of action, arguing that the Cifligus "were owed no legal or fiduciary duties" and that "the statute of limitations has expired on all claims." With regard to the first issue, the Brokers asserted the Cifligus "failed to demonstrate . . . that a fiduciary relationship existed, or that [the Cifligus] were in contractual privity with [the Brokers] or

were intended third-party beneficiaries to a contract with [the] Brokers." The Brokers also argued that Coleman did not assign the second through eighth causes of action to the Cifligus "[b]ecause the term 'thereunder' was used" in the assignment and the seven claims at issue "do not arise under the lease."

The Brokers further maintained that, "even if there was an assignment, some of the claims asserted by [the Cifligus] against [the] Brokers cannot be assigned as a matter of California public policy." Additionally, the Brokers insisted that "Coleman should have had notice as early as January 15, 2008 regarding issues relating to disclosure to Ambitions," meaning that the limitations period expired "at the very latest" on January 15, 2012.

In their opposition, the Cifligus countered that, "[b]y its terms, there is no question that the Assignment necessarily included the transfer of the right to sue [the Brokers], as the failure to disclose environmental contamination was an obligation of [the Brokers] incident to preparing the lease." Their opposition also claimed that paragraph 25(b) of the lease is a "contractual right-to-sue" that "unequivocally enables the Cifligus to sue" the Brokers. They further contended: (a) The Brokers "failed to establish an exception to the rule of assignability of a chose in action"; (b) the Brokers owed a duty of care directly to the Cifligus because they were " 'foreseeably injured by [the Brokers'] negligence' "; (c) the Cifligus "have standing to sue [the Brokers] independent of the assignment of the Lease because [the Cifligus] were third party beneficiaries of the Lease"; and (d) the instant claims are timely because the Brokers did not show that Coleman knew they had failed to disclose the environmental contamination to Ambitions.

In their reply, the Brokers argued for the first time that Coleman released "any and all claims or rights arising from the sale transaction and lease transaction at the Property," thereby rendering it "impossible" for the Cifligus to assert such claims against the Brokers. Furthermore, the Brokers asserted that "seven years after any transaction by [the] Brokers, [the Cifligus] acquired the Property using their own broker, who owed [them] fiduciary duties," and the Cifligus "were therefore responsible for their own due diligence prior to purchasing the Property, thereby making any claim against [the] Brokers unwarranted." Additionally, the Brokers noted that paragraph 25(b) of the lease provided that "no lawsuit or other legal proceeding involving any breach of duty, error or omission relating to this Lease may be brought against [them] more than one year" after the beginning of the lease term. (Boldface omitted.)

4. *The trial court's ruling on the Brokers' motion*

On April 8, 2019, the trial court issued a minute order granting the Brokers' motion for summary adjudication on the Cifligus' second, third, fourth, fifth, sixth, seventh, and eighth causes of action, wherein the court reasoned that "there is no competent admissible evidence . . . demonstrating any duty under contract, tort or statute owed by [the Brokers] to [the Cifligus]."

In its ruling, the court rejected the Cifligus' theory that the Brokers directly owed a duty of care to them. Specifically, the order includes a paragraph that analyzes the factors announced in *Biakanja v. Irving* (1958) 49 Cal.2d 647 (*Biakanja*),[8] and ends

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[8] " '[R]ecognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial

its analysis with the conclusion that, "[b]alancing all of the *Biankanja* [*sic*] factors, . . . it is unreasonable to impose a duty of care upon [the Brokers] where [the Cifligus] acquired the property seven years after any performance by [the Brokers]." (Italics added.) That paragraph then closes with the following sentence: "[The Cifligus] acquired the subject property presumably utilizing their own brokers who directly owed fiduciary duties to them which would encompass assisting [the Cifligus] in conducting due diligence prior to purchasing the property."

Furthermore, in addressing the seventh cause of action for breach of contract, the trial court remarked: "The language of the Assignment specifically provides for assignment of all of Coleman's rights 'thereunder'—that is, under the lease and guaranty. Because the term 'thereunder' was used in the [Assignment], the only rights assigned were those assigned from the Lease and any purported rights assigned to [the Clifligus]

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transactions is the exception, not the rule, in negligence law . . . .' [Citation.] The test for determining the existence of such an exceptional duty to third parties is set forth in the seminal case of *Biakanja*, *supra*, 49 Cal.2d at page 650, as follows: 'The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm.' " (See *Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1013–1014.)

from Mr. Coleman were limited to those rights under the Lease. [Citation.] The language of the Assignment does not establish a contractual relationship between [the Cifligus] and [the Brokers]."

Additionally, the lower court concluded that, "even assuming [the Brokers] had a duty of care based on the Assignment from Coleman" to the Cifligus, all seven of the causes of action targeted by the Brokers' motion are time-barred. According to the trial court, "[w]hen the Lease between Ambitions and Coleman was executed in January 2008, Coleman had already received" certain "documents related to the environmental condition of the property, due diligence materials, and the subject covenant." It further concluded that "[t]he statute of limitations for each of [the Cifligus'] causes of action," which "range from three to four years," had "accrued when Mr. Coleman had or should have had inquiry notice as to any non-disclosure, and therefore began on January 15, 2008." As the Cifligus filed their initial complaint against the Brokers nine years later, the court concluded the instant causes of action were untimely.

On May 23, 2019, the trial court issued an order that: (1) reiterated the Brokers' motion for summary adjudication had been granted; (2) stated that "judgment in favor of [the Brokers] shall be entered against [the Cifligus]" on the first amended complaint's second, third, fourth, fifth, sixth, seventh, and eighth causes of action; and (3) provided that "it is ordered, adjudged and decreed [that the Cifligus] take nothing by their First Amended Complaint as to Causes of Action Two through Eight." (Capitalization omitted.) On July 18, 2019, the Cifligus appealed that judgment.

On August 5, 2019, the trial court entered another judgment, which once again stated that the Brokers' summary adjudication motion had been granted and that "[j]udgment is entered in favor of Defendants Colliers International Greater Los Angeles, Inc. and Geoffrey Ludwig, and against Plaintiffs Muhamet Cifligu and Zenepe Cifligu." (Capitalization omitted.) The judgment further provided: "Defendants Colliers International Greater Los Angeles, Inc. and Geoffrey Ludwig are awarded judgment against Plaintiffs Muhamet Cifligu and Zenepe Cifligu for attorney's fees and costs actually and reasonably incurred to the extent provided by contract or law, timely filed motion [*sic*] and/or memorandum of costs filed by Colliers International Greater Los Angeles, Inc. and Geoffrey Ludwig." (Capitalization omitted.) The judgment did not, however, award a specific amount of attorney fees and costs to the Brokers.[9]

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[9] Paragraph 31 of the lease provides in pertinent part: "If any Party or Broker brings an action or proceeding involving the Premises whether founded in tort, contract or equity, or to declare rights hereunder, the Prevailing Party (as hereafter defined) in any such proceeding, action, or appeal thereon, shall be entitled to reasonable attorneys' fees. . . . The term, 'Prevailing Party' shall include, without limitation, a Party or Broker who substantially obtains or defeats the relief sought, as the case may be, whether by compromise, settlement, judgment, or the abandonment by the other Party or Broker of its claim or defense." Because the appellate record does not include any request on the part of the Brokers for attorney fees, we are unable to determine whether the trial court's ruling relied on paragraph 31.

The Cifligus appealed the second judgment on October 4, 2019. The notice of appeal stated that it was "being filed in an abundance of caution," and noted that "[t]he Appeal of the Order Granting Summary Judgment is currently pending as Appeal No. B299239." We later consolidated the Cifligus' two appeals.

STANDARD OF REVIEW

" 'We review the ruling on a motion for summary judgment de novo, applying the same standard as the trial court.' [Citation.] 'Summary judgment is appropriate only "where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law." ' [Citation.] We view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor." (*Barenborg v. Sigma Alpha Epsilon Fraternity* (2019) 33 Cal.App.5th 70, 76.) "In reviewing an order granting summary adjudication of an issue, we apply the same de novo standard of review that applies to an appeal from an order granting summary judgment." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 363.)

" ' On review of a summary judgment, the appellant has the burden of showing error, even if he did not bear the burden in the trial court. [Citation.] . . . "[D]e novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant's responsibility to *affirmatively demonstrate error* and, therefore, to *point out the triable issues the appellant claims are present by citation to the record and any supporting authority*. In other words, review is limited to issues which have been adequately raised and briefed."

[Citation.]' [Citation.]" (*Golightly v. Molina* (2014) 229 Cal.App.4th 1501, 1519 (*Golightly*), italics added.)

DISCUSSION

On appeal, the Cifligus argue that the trial court erred by: (1) disregarding the Cifligus' theory that they could sue the Brokers as Coleman's assignees and granting the Brokers' motion "based upon the lack of any direct relationship between the Cifligus and the Brokers"; (2) violating the Cifligus' due process rights by adopting an argument made by the Brokers in their reply to the Ciflgus' opposition brief; and (3) deciding that the Cifligus' second, third, fourth, fifth, sixth, seventh, and eighth causes of action were time-barred.

For the reasons discussed below, we conclude that the trial court actually did reject the Cifligus' claim that Coleman assigned the instant choses in action to them. We further conclude that the Cifligus have not shown that this ruling was incorrect, they improperly raise new contentions for the first time in their reply brief, and their due process claim lacks merit. Because the Cifligus admit that their "position is based on a complete (and lawful) assignment of [Coleman's] rights" and they have not properly established a triable question in that regard, we affirm the trial court's ruling without reaching the other issues raised on appeal (e.g., the timeliness of the Cifligus' claims and whether public policy prohibits the assignment of certain claims).

Before turning to the merits of Cifligus' consolidated appeal, we must first resolve a jurisdictional issue that the Cifligus obliquely note by arguing that they filed the second appeal "in an abundance of caution," but that the parties do not otherwise address. (See *Nguyen v. Calhoun* (2003)

105 Cal.App.4th 428, 436 ["None of the parties to this appeal raised the threshold issue of whether the judgment is appealable. Nevertheless, 'since the question of appealability goes to our jurisdiction, we are dutybound to consider it on our own motion.' "].)

A. We Have Jurisdiction Over the First Appeal, and We Dismiss the Second Appeal

" 'Under the "one final judgment" rule, an order or judgment that fails to dispose of all claims between the litigants is not appealable under Code of Civil Procedure section 904.1, subdivision (a).' [Citation.]" (*Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 9 (*Ram*).) At first blush, the one final judgment rule would appear to bar the Cifligus' consolidated appeal. Neither of the judgments being appealed resolved the Cifligus' claims against Ambitions or Ambitions' cross-claims against the Cifligus, and the appellate record does not show that all of the claims between the Cifligus and Ambitions were terminated prior to the entry of either of the judgments the Cifligus appeal.

The one final judgment rule, however, does not apply " ' "when the case involves multiple parties and a judgment is entered which leaves no issue to be determined as to one party. [Citations.]" ' [Citation.]" (*Ram*, *supra*, 234 Cal.App.4th at p. 9.) We conclude that the first judgment entered by the trial court shortly after granting the Brokers' motion falls within this exception to the one final judgment rule. That judgment provides in pertinent part: "[I]t is ordered, adjudged and decreed [that the Cifligus] take nothing by their First Amended Complaint as to Causes of Action Two through Eight." (Capitalization omitted.) Prior to the issuance of that judgment, the court clerk had, at the

Cifligus' request, entered a dismissal with prejudice on their first cause of action for equitable indemnity. Thus, no claims were pending between the Cifligus and the Brokers after the trial court entered this judgment.

Although all the Cifligus' claims against the Brokers had been terminated upon the entry of this first judgment, the trial court later entered a second judgment in favor of the Brokers and against the Cifligus. It seems that the trial court issued this second judgment to declare that the Brokers were entitled to attorney fees and costs, yet the second judgment also explicitly reiterated that "[the Cifligus] shall take nothing by way of their Complaint as to [the Brokers] and that the action is dismissed with prejudice on the merits as to [the Brokers]."

On appeal, the Cifligus do not explicitly challenge the determination regarding fees and costs, and, even if they did, we would lack jurisdiction over that nonfinal portion of the second judgment because that judgment does not set forth any amount of attorney fees or costs. (See *P R Burke Corp. v. Victor Valley Wastewater Reclamation Authority* (2002) 98 Cal.App.4th 1047, 1053 [" ' "[W]here anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory." [Citations.]' [Citation.] A judgment, however, may have both final, appealable portions and interlocutory, nonappealable portions. [Citations.] . . . [¶] . . . [I]f a judgment determines that a party is entitled to attorney's fees but does not determine the amount, that portion of the judgment is nonfinal and nonappealable."].)

Furthermore, insofar as the second appeal is merely a vehicle for contesting the trial court's order granting summary adjudication (i.e., by challenging the trial court's decision to enter

judgment in favor of the Brokers on the second through eighth causes of action from the Cifligus' first amended complaint), that appeal is moot. We cannot afford the Cifligus any relief from this aspect of the second judgment, given that the Cifligus' appeal of the first judgment already allows us to reach the merits of the lower court's decision on the Brokers' motion and, upon reaching the merits, we uphold the lower court's ruling on that motion. (See *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 214 ["A case is moot when the decision of the reviewing court 'can have no practical impact or provide the parties effectual relief. [Citation.]' [Citation.] 'When no effective relief can be granted, an appeal is moot and will be dismissed.' "]; Parts B–E, *post*.)

In conclusion, we dismiss the Cifligus' appeal of the second judgment because the determination that the Brokers are entitled to attorney fees and costs is nonappealable and any challenge to the remainder of that second judgment is mooted by our affirmance of the first judgment.

B. The Trial Court Disapproved of the Cifligus' Theory that Coleman Assigned the Instant Causes of Action to Them

On appeal, the Cifligus explain that they raised the second through eighth causes of action in their capacity as the assignees of Coleman's rights, and not in any other capacity. They further claim that "the trial court never addressed the Cifligus' causes of action based upon their status as assignees of the rights of Coleman" (italics omitted), and that "it cannot be ascertained from the Order whether the trial court simply ignored the issue of assignability or rejected it." Although they acknowledge "the trial court state[d] that the assignment uses the term rights

'thereunder' which the trial court state[d] limits the assignment to the Lease 'and does not establish a contractual relationship' between the Brokers and the Cifligus," the Cifligus argue that "[t]his [passage from the ruling] *obviously* has nothing to do with bringing claims as an assignee of those rights." (Italics added.) The Cifligus apparently believe the court merely ascertained whether "[t]he assignment, in and of itself, would . . . have created or established a new 'contractual relationship' *directly* between the Brokers and the Cifligus," and not whether the assignment conveyed upon them the right to bring suit against the Brokers for a breach of their duty to disclose the environmental contamination to Ambitions. (Italics added.)

We conclude the trial court did address—and reject—the Cifligus' theory that they may bring suit against the Brokers as Coleman's assignees. The trial court's ruling indicates it construed the assignment in order to assess the Cifligus' claim that " 'the Lease and *all related rights and obligations* were assigned and transferred by Coleman to [the Cifligus]' " pursuant to that instrument. (Italics added.) Specifically, the Cifligus argued below that the assignment's terms "necessarily included the transfer of the right to sue [the Brokers], as the failure to disclose environmental contamination was an obligation of [the Brokers] incident to preparing the lease."

The trial court found that, "[b]ecause the term 'thereunder' was used in the [instrument], the only rights assigned were those assigned from the Lease and any purported rights assigned to [the Cifligus] from Mr. Coleman were limited to those rights under the Lease." This narrow construction of the assignment forecloses the Cifligus' theory that the assignment authorizes them to raise claims arising out of "an obligation . . . *incident to*

preparing the lease." (Italics added.) That the court went on to conclude that "[t]he language of the Assignment does not establish a contractual relationship between [the Cifligus] and [the Brokers]" does not undermine our conclusion that the trial court expressly considered and rejected the Cifligus' assignment theory.

Consequently, to prevail on appeal, the Cifligus must "affirmatively demonstrate" the trial court erred in holding the language of the assignment did not cover their claims against the Brokers. (See *Golightly*, *supra*, 229 Cal.App.4th at p. 1519.) For the reasons discussed in Parts C and D, *post*, we find the Cifligus have not properly discharged their appellate burden.

C. The Cifligus Fail to Show the Trial Court Erred in Rejecting Their Assignment Theory

The Cifligus argue the lease itself includes a "contractual right-to-sue" that "unequivocally empowers" them, as assignees, to sue the Brokers. They also reassert their theory that "the right to sue the Brokers for defects in the preparation of the Lease" (including, presumably, the Brokers' failure to make the environmental disclosures) "necessarily passed to [them]" as a right that is "incidental" to the lease. Additionally, they suggest that because the lease provides that the Brokers "would have rights against the assignee [of the landlord] to collect their commission," the lease implicitly authorized Coleman's assignees to sue the Brokers for failing to make the environmental disclosures to Ambitions. We conclude these arguments are unavailing.

First, the Cifligus claim that "[p]aragraph 25 (b) of the Lease specifically provides that the Parties (expressly including the 'Lessor') may sue the Brokers for 'any breach of duty, error or

omission relating to this Lease' and that there is no ceiling on the damages that may be awarded against the Brokers where there has been 'gross negligence or willful misconduct of such Broker' (such as has occurred herein)."

Paragraph 25(b) provides: "Brokers have no responsibility with respect to any default or breach hereof by either Party. The parties agree that no lawsuit or other legal proceeding involving any breach of duty, error or omission relating to this Lease may be brought against Broker more than one year after the Start Date and that the liability (including court costs and attorneys' fees) of any Broker with respect to any such lawsuit and/or legal proceeding shall not exceed the fee received by such Broker pursuant to this Lease, provided, however, that the foregoing limitation on each Broker's liability shall not be applicable to any gross negligence or willful misconduct of such Broker."

The Cifligus fail to explain how paragraph 25(b)'s explicit *limitations* on the Brokers' liability may be read to confer upon the Cifligus (as Coleman's assignees) a "contractual right-to-sue" the Brokers for failing to make environmental disclosures to Ambitions. Instead, it seems that the Cifligus' invocation of paragraph 25(b) rests on their selective quotation from the paragraph, which omits language indicating that paragraph 25(b) actually restricted—and did not affirmatively set forth—the scope of the Brokers' liability. Thus, the Cifligus have not met their burden of showing error "by citation to the record and any supporting authority." (See *Golightly*, *supra*, 229 Cal.App.4th at p. 1519.)

Next, the Cifligus rely upon *National Reserve Co. v. Metropolitan Trust Co.* (1941) 17 Cal.2d 827, to support their assertion that the choses in action at issue were assigned to them

as rights "incidental" to the lease. *National Reserve Co.* held that "[a]n unqualified assignment of a contract or chose in action . . . with no indication of the intent of the parties, vests in the assignee the assigned contract or chose and all rights and remedies incidental thereto," and that "[t]hese incidental rights include certain ancillary causes of action arising out of the subject of the assignment and *accruing before the assignment is made*." (See *id.* at pp. 832–833, italics added.) Our high court further stated that "[i]f . . . *an accrued cause of action* cannot be asserted apart from the contract out of which it arises or is essential to a complete and adequate enforcement of the contract, it passes with an assignment of the contract as an incident thereof." (See *id.* at p. 833, italics added.)

The Cifligus argue that, "[s]ince the Lease could not be enforced by anyone other than the Cifligus, and the Lease could no longer be enforced against Ambitions because of the Brokers' . . . failure to timely make disclosure of the contamination, the right to sue the Brokers for defects in preparation of the Lease necessarily passed to the Cifligus." The Cifligus make a noteworthy concession that demonstrates *National Reserve Co.* is inapposite.

Elsewhere in their briefing, the Cifligus challenge the trial court's conclusion that their seven causes of action were time-barred. In particular, the Cifligus contend that "[a] cause of action accrues when the elements of the cause of action occur, and this necessarily requires damages to have been incurred," and that, although the Brokers had allegedly breached their duty to "make the mandatory disclosures of the contamination to Ambitions" at the time the lease was executed, "[n]o damages of any kind were incurred until Ambitions announced its intention

to vacate the property due to the contamination and stopped paying rent." Furthermore, the Cifligus aver that Ambitions provided notice of its intent to vacate in 2016, and there is no dispute that Coleman and the Cifligus executed the assignment on September 26, 2014.

Thus, the Cifligus essentially admit that their claims had not accrued before the assignment was made, and we may rely on this admission in assessing whether they have met their appellate burden. (See *Artal v. Allen* (2003) 111 Cal.App.4th 273, 275, fn. 2. [" '[B]riefs and argument . . . are reliable indications of a party's position on the facts as well as the law, and a reviewing court may make use of statements therein as admissions against the party. [Citations.]' "].) The Cifligus do not explain why their choses in action nonetheless constitute "incidental rights" for the purposes of *National Reserve Co*.

Lastly, the Cifligus maintain that "[t]he Brokers cannot, on the one hand, claim to have rights against all Lease assignees to recover commissions, and on the other claim that all assignees have no rights against the Brokers." The Cifligus do not further explain why the Brokers' apparent third-party beneficiary status under the lease authorizes Coleman's assignees to bring suit against the Brokers for failing to disclose the covenant and the environmental contamination to the property, nor do they cite any authority to support that position. Therefore, the Cifligus have waived any reliance on this legal theory. (See *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 [" 'Appellate briefs must provide argument and legal authority for the positions taken.' . . . 'We are not bound to develop appellants' arguments for them. [Citation.] The absence

of cogent legal argument or citation to authority allows this court to treat the contention as waived.' "].)

For these reasons, the Cifligus have not affirmatively demonstrated the trial court erred in concluding they may not maintain their claims as Coleman's assignees.

D. We Disregard the New Arguments the Cifligus Raise in Their Reply

In their reply, the Cifligus advance the following arguments for the first time: (1) Paragraph 25(a) of the lease authorized them, as Coleman's assignees, to bring suit against the Brokers for failing to provide the environmental disclosures to Ambitions;[10] and (2) the dual-agency consent form and the

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[10] Paragraph 25(a) of the lease provides: "When entering into a discussion with a real estate agent regarding a real estate transaction, a Lessor or Lessee should from the outset understand what type of agency relationship or representation it has with the agent or agents in the transaction. Lessor and Lessee acknowledge being advised by the Brokers in this transaction, as follows: [¶] (i) Lessor's Agent. A Lessor's agent under a listing agreement with the Lessor acts as the agent for the Lessor only. A lessor's agent or subagent has the following affirmative obligations: To the Lessor: A fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Lessor. To the Lessee and the Lessor: a. Diligent exercise of reasonable skills and care in performance of the agent's duties. b. A duty of honest and fair dealing and good faith. c. A duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the Parties. An agent is not obligated to reveal to either Party any confidential information obtained from the other Party which does not involve

the affirmative duties set forth above. [¶] (ii) Lessee's Agent. An agent can agree to act as an agent for the Lessee only. In these situations, the agent is not the Lessor's agent, even if by agreement the agent may receive compensation for services rendered, either in full or in part from the Lessor. An agent acting only for a Lessee has the following affirmative obligations: To the Lessee: A fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Lessee. To the Lessee and the Lessor: a. Diligent exercise of reasonable skills and care in performance of the agent's duties. b. A duty of honest and fair dealing and good faith. c. A duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the Parties. An agent is not obligated to reveal to either Party any confidential information obtained from the other Party which does not involve the affirmative duties set forth above. [¶] (iii) Agent Representing Both Lessor and Lessee. A real estate agent, either acting directly or through one or more associate licensees, can legally be the agent of both the Lessor and the Lessee in a transaction, but only with the knowledge and consent of both the Lessor and the Lessee. In a dual agency situation, the agent has the following affirmative obligations to both the Lessor and the Lessee: a. A fiduciary duty of utmost care, integrity, honesty and loyalty in the dealings with either Lessor or the Lessee. b. Other duties to the Lessor and the Lessee as stated above in subparagraphs (i) or (ii). In representing both Lessor and Lessee, the agent may not without the express permission of the respective Party, disclose to the other Party that the Lessor will accept rent in an amount less than that indicated in the listing or that the Lessee is willing to pay a higher rent than that offered. The above duties of the agent in a real estate transaction do not relieve a Lessor or Lessee from the responsibility to protect their own interests. Lessor and Lessee should carefully read all agreements to assure

lease must be construed together as part of the same transaction such that Coleman's right to bring suit against the Brokers was assigned to the Cifligus.

These new arguments are not, as the Cifligus suggest, only responsive to the contentions raised in the respondents' brief. As noted in Part B, *ante*, the trial court necessarily rejected the Cifligus' argument that the assignment transferred to them the right to sue the Brokers for failing to make the environmental disclosures to Ambitions. Furthermore, the Cifligus acknowledge in their opening appellate brief that the Brokers' motion "alleged that the rights upon which the Cifligus sued were not assigned to [them]" and that "(a) [the assignment was] not a blanket, general assignment of all of Coleman's rights whatsoever; and (b) the rights upon which the Cifligus can sue are those arising out of the Lease." Thus, long before the Cifligus filed their opening brief, they knew that whether Coleman assigned them the right to bring suit against the Brokers was a key point of contention.

By failing to raise all arguments supporting their assignment theory in the opening brief, the Cifligus have deprived the Brokers of an adequate opportunity to address them. Consequently, we disregard their new arguments. (*Regency Outdoor Advertising, Inc. v. Carolina Lanes, Inc.* (1995) 31 Cal.App.4th 1323, 1326, 1333 ["To the extent [appellant] raised new arguments . . . in its reply brief on appeal, we do not reach them."].)

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that they adequately express their understanding of the transaction. A real estate agent is a person qualified to advise about real estate. If legal or tax advise [*sic*] is desired, consult a competent professional."

E. The Cifligus' Due Process Claim Fails

The Cifligus contend that the trial court violated their due process rights by adopting a new and unsupported argument that was raised for the first time in the reply brief the Brokers filed below. Specifically, the Cifligus complain that the trial court adopted the Brokers' untimely argument that the Cifligus employed their own real estate brokers when they acquired the property.

As we noted in Part 4 of the Factual and Procedural Background, *ante*, the trial court made the following statement after it had concluded that the *Biakanja* factors did not support the imposition of a duty of care on the Brokers: "[The Cifligus] acquired the subject property presumably utilizing their own brokers who directly owed fiduciary duties to them which would encompass assisting [the Cifligus] in conducting due diligence prior to purchasing the property." The trial court did not state that the "presum[ed]" existence of the Cifligus' "own brokers" played any role in its analysis of the *Biakanja* factors, or that it had any effect on its ruling on the Brokers' motion. Given the context of the trial court's statement, we conclude that it was merely an invitation to the Cifligus to bring suit against any brokers they may have employed when they acquired the property in question.

Indeed, the Cifligus do not argue that this statement played any substantive role in the trial court's legal analysis. They correctly note the court did not "analyz[e] the scope of such fiduciary duties" owed by any real estate brokers they could have retained or examine "how such presumed duties related to the Brokers' non-disclosure of contamination to Ambitions."

Rather, the Cifligus contend "the trial court's entire perspective of the Cifligus' position" was "[u]ndoubtedly . . . tainted" by the "erroneous belief that the Cifligus had *direct* recourse to *other fiduciaries*." To establish that the court conferred some amorphous and intangible advantage upon the Brokers, the Cifligus repeat their claim that "the trial court ignored the assignment from Coleman to the Cifligus." We have already rejected that premise in Part A, *ante*.

For these reasons, we find that the Cifligus have not affirmatively demonstrated that the Brokers' belated argument had any "taint" on the trial court's decision to grant the motion for summary adjudication. It follows that the trial court did not violate the Cifligus' due process rights. (See *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316 ["Where a remedy as drastic as summary judgment is involved, due process requires a party be fully advised of the issues to be addressed and be given adequate notice of what facts it must rebut *in order to prevail*," italics added].)

DISPOSITION

The judgment appealed in case No. B299239 is affirmed. The appeal in case No. B301547 is dismissed. The Brokers are awarded their costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J. CHANEY, J.